No. 22358

United States
Court of Appeals
for the Ninth Circuit

RONALD LEE MEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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Rule 30, *Federal Rules of Criminal Procedure - Instructions*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Rule 52, *Federal Rules of Criminal Procedure - Harmless Error and Plain Error*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 28(a), *Federal Rules of Appellate Procedure - Briefs*

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues

presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

(5) A short conclusion stating the precise relief sought.

Rule 5, *Rules of the United States Court of Appeals for the Ninth Circuit - Practice*

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, whenever relevant, are adopted as part of the rules of this court. In cases where the Federal Rules of Appellate Procedure and the Rules of the United States Court of Appeals for the Ninth Circuit are silent as to a particular matter of appellate practice, any relevant rule of the Supreme Court of the United States shall be applied.

Rules 40 1, (b), (c), (d), (e), *Revised Rules for the Supreme Court of the United States*

1. Briefs of an appellant or petitioner on the merits shall be printed as prescribed in Rule 39, and shall contain in the order here indicated—

* * *

(b) A concise statement of the grounds on which the jurisdiction of this court is invoked, with citation to the statutory provision and to the time factors upon which such jurisdiction rests.

(c) The constitutional provisions, treaties, statutes, ordinances and regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(d)(1) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein.

(2) The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented.

(e) A concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the appendix, e.g., (A. 12) or to the record, e.g., (R. 12).

No. 22358

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Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE[1][2]

On April 7, 1967, the Grand Jury returned a three (3) count indictment jointly charging the defendant Ronald Lee Meyer and one Donald Edward Camp-

[1] As used hereafter "TR" denotes transcript of proceedings, "Govt. Ex." Government's exhibits at trial, "D. Br." defendant's brief on appeal, and "Govt. App." Government's Appendix.

[2] Appellant's references to the Government's trial memorandum can only be described as a *non sequitur* since this pleading was prepared at the instance of the trial court to determine, if possible, the nature of the Government's evidence as well as any

bell[3] with receiving, concealing and selling certain motor vehicles which were moving in interstate commerce and which the defendants knew to have been stolen in violation of Title 18, Section 2313, United States Code (Govt. App. 10-11).

The trial commenced on June 20, 1967 and concluded on June 22, 1967, at which time the jury returned a verdict of guilty as to both defendants on all three counts. Each defendant was committed to the custody of the Attorney General for a period of five (5) years on each count, said sentences to run concurrently, and a ninety (90) day study ordered pursuant to provisions of Title 18, Section 4208(c) and 4208(b), United States Code. After initially electing to submit to the study, defendant Meyer posted bond and prosecuted his appeal.

The undisputed evidence admitted during the trial showed that in January 1967 the defendants purchased three (3) late model cars in salvage condition. The serial or warranty tags along with the li-

legal issues which might arise during trial. So far as the jury was concerned, the memorandum was never a matter of record nor was there ever any reference to it at any stage of the trial. Since this document was filed solely for the convenience of the trial court and not in response to any motions for a bill of particulars or discovery, the Government does not consider itself bound by or limited to any statements appearing therein.

[3] Following his conviction, defendant Campbell filed notice of appeal but to date has not perfected same.

cense plates from these vehicles were removed and affixed to cars of a similar description stolen in the State of Washington and later sold to dealers in Portland, Oregon, using the certificates of title from the salvage items as evidence of ownership.

On January 17, 1967, a poppy red 1965 two-door Mustang hardtop, owned by Compact City in Seattle, Washington, and being repaired by Commet Auto Rebuild, was stolen by a person or persons unknown (TR. 19-20, 26-27; Govt. Ex. 21, 41, 44).

On January 18, 1968, Meyer and Campbell appeared at Lincoln Auto Wreckers in Seattle, Washington (TR. 30-31, 65-67, 283, 345). Campbell, who represented himself as Ron Meyers, an out-of-state dealer, purchased a yellow 1965 Mustang without motor and transmission for $500.00 in cash (TR. 30-36; Govt. Ex. 16, 17, 18, 19, 40). Campbell received title to the vehicle while Meyer removed the license plates and warranty or serial tag from the left front door and placed them in back of his 1963 Cadillac (TR. 35-36, 67-68, 69, 283-284, 290-291; Govt. Ex. 40). The Mustang was never removed from its place of purchase although Meyer returned briefly a week later and inquired of its whereabouts (TR. 68-71, 309-310).

At approximately 6:00 P.M. on January 19, 1967, the 1965 poppy red Mustang stolen two days before

from Commet Auto Rebuild and bearing the serial tag, license plates and title of the salvage vehicle from Lincoln Auto Wreckers was sold to Mr. Samuel Neighbors of Joe Hoag Motors, Portland, Oregon, by defendant Meyer (TR. 97-101, 286-287; Govt. Ex. 14, 15, 40). In payment for this vehicle, Meyer received and subsequently negotiated a $1,400.00 check (TR. 100-101, 286-287; Govt. Ex. 15). The proceeds of the check were thereafter divided between the two defendants, with Meyer claiming Campbell received the bulk of the money (TR. 286-288). Campbell, however, contended Meyer retained the entire amount (TR. 360-361).

An examination of this vehicle at the Portland Police Garage by Special Agents Max Taylor and Howard Earp of the Federal Bureau of Investigation disclosed the warranty tag or plate appearing on the left front door was attached with a bolt or screw commonly known as a molly screw rather than with a hollow-head or exploding rivet traditionally used on Ford automotive products. (TR. 180-181). In the area under the hood where the public vehicle identification number[4] is located, there appeared to be a complete absence of any num-

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[4] Since 1955 on Ford automotive products the vehicle identification and serial number have been synonymous and are used interchangeably. This number is located under the hood and on the warranty plate or serial tag attached to the left front door (TR. 176-180).

ber. However, approximately eight (8) inches to the rear of this area appeared a number which corresponded with the number on the warranty tag with the exception that the next to last digit was missing. An examination of the secondary vehicle identification number[5] disclosed it differed from the numbers appearing under the hood on the left front fender apron and on the warranty tag (TR. 180-181). The use of paint remover on the area where the public vehicle identification should have appeared revealed the presence of pounding and grinding (TR. 182; Govt. Ex. 21-23, 25-28). A comparison between a 3 by 5 inch index card containing a fingerprint and scotch tape "lift" of the secondary vehicle identification number from this vehicle with the dealer's records from Compact City, Seattle, Washington, for the 1965 Mustang stolen January 17, 1967 are conclusive of the theft (TR. 181, 183-184; Govt. Ex. 27, 41).

The succeeding day, January 20, 1967, the defendants presented themselves at Auto Salvage in Portland and inquired about two pieces of salvage: a 1964 Ford Galaxie and a 1965 Mustang (TR. 110-

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[5] In 1965 Mustangs, the public serial or vehicle identification number is located on the top flange on the left front fender apron, approximately 12-14 inches from the front of the car. The number is also placed in secondary locations known only to the manufacturer, Federal Bureau of Investigation, and the National Automobile Theft Bureau (TR. 177-180).

112). The negotiations culminated with Campbell purchasing the above vehicles, minus motors and transmissions for $750.00 cash (TR. 112, 113; Govt. Ex. 9, 10, 12, 30, 31). The titles to the cars along with the receipt for the sale were given to Campbell although the later document bore the name of Ron Meyer (TR. 114-116; Govt. Ex. 2, 13, 43).

Sometime between the sale[6] and the following Monday, Meyer removed the license plates and warranty or serial tags from the cars and again placed them in the rear of his 1963 Cadillac (TR. 118, 137, 289-290).

Although the defendants removed the 1964 Ford Galaxie, they never returned to claim the Mustang (TR. 120).

On January 22, 1967, two days after their transaction with Auto Salvage in Portland, a 1964 Ford Galaxie XL, two-door hardtop, was stolen from Dewey Griffins Used Car Lot in Lynnwood, Washington, and a second 1965 Ford Mustang two-door hardtop was stolen from Austin Fraser Used Cars in Seattle, Washington, by a person or persons unknown (TR. 145-147; Govt. Ex. 45 and TR. 150-153; Govt. Ex. 42).

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[6] January 20, 1967 was a Friday.

The following day, January 23, 1967, defendant Meyer reappeared at Joe Hoag Motors in Portland where he sold a 1964 Ford XL to Mr. Samuel Neighbors for $1,000.00 (TR. 102-106; Govt. Ex. 1, 3). At the time of the sale, this car bore the warranty tag, license plates and accompanying title of of the Ford Galaxie purchased from Auto Salvage only three days earlier (TR. 189-192; Govt. Ex. 2, 3, 5, 6, 7; see also TR. 116-117 and Govt. Ex. 12 which is the inventory record of Auto Salvage containing the license and serial numbers of the 1964 Ford Galaxie at the time it was sold to the defendants).

A subsequent examination of this vehicle by Special Agent Taylor revealed the warranty plate was attached to the left front door with pop or cherry rivets rather than the hollow head rivet used by Ford, while the area where the vehicle identification number should have appeared had been torn off[7] (TR. 190-191; Govt. Ex. 4). The secondary vehicle identification number was also found to differ from those appearing on the warranty tag and title (TR. 190-192; compare also Govt. Ex. 2, the title, and Govt. Ex. 5, the actual warranty plate, with Govt. Ex. 8, a scotch tape and fingerprint powder

[7] On a 1964 Ford Galaxie the serial or vehicle identification number appears under the hood on an extension on the right-hand side of the cowl (TR. 178).

"lift" of the secondary number). A comparison between the secondary number and the records from Dewey Griffins Used Car Lot in Lynnwood, Washington, for the 1964 Ford Galaxie stolen January 17, 1967, establish the theft of the vehicle (Govt. Ex. 8 and 45).

Approximately noon on this same date both defendants appeared at Jack's Eastport Motors in Portland and attempted without success to sell the 1964 Ford XL two-door hardtop (TR. 156-158). They left with this car after noting they also had a 1965 Mustang for sale. Both defendants returned on the same afternoon with a turquoise 1965 Mustang which they sold for $1,350.00 (TR. 158-161). The title to the vehicle was produced by Campbell while the check for its payment was drawn in the name of Ron Meyer at Campbell's instance (TR. 159, 161, 168-169; Govt. Ex. 29, 43). Prior to consummating the transaction, the purchaser checked the title proffered by Campbell against license plates and warranty tag on the car and found they were in consonance (TR. 160, 167-168). No examination was made under the hood of the car (TR. 160).

In addition to the title, the warranty tag and the license plates on this vehicle were identical to those previously removed by Meyer from the 1965 Mustang salvage item purchased from Auto Salvage on

January 20, 1967 (Compare TR. 195-199 and Govt. Ex. 33, 34, 36 with TR. 116-117, 137-138 and Govt. Ex. 30, 31, 32, 43). The car's public vehicle identification number had also been pounded out, ground down, and painted over, and a new number inserted which corresponded with the documents of title (TR. 195-199, and compare Govt. Ex. 35, a picture of the fictitious vehicle identification number with Govt. Ex. 36 and 43 which are the warranty tag and the title, respectively). As in the case of the other stolen vehicles, the warranty tag was attached to the left front door with pop-type rivets while the secondary number failed to correspond with the numbers on the warranty tag or title (TR. 196; Govt. Ex. 36, 37, 37-A, 43). A comparison of the fingerprint and scotch tape "lift" of the secondary number with the records of Austin-Fraser in Seattle for the 1965 Mustang stolen on January 22, 1967, established the theft of this vehicle (TR. 196-197, 199; Govt. Ex. 37, 37-A, 42).

On February 3, 1967, the defendants again returned to Auto Salvage in Portland at which time Campbell informed the general manager Marvin Wright he would pay $300.00 for each set of license plates, warranty tags and titles Wright could supply (TR. 110-111, 116-119).

On the morning of February 8, 1967, the defendants reappeared and Campbell inquired whether

there were any titles or plates available. Plans were then made to meet the same evening for a drink (TR. 121).

As Mr. Wright left his house on the evening of the 8th, he was forced to the curb by a 1963 Cadillac driven by Meyer and accompanied by Campbell (TR. 122). At the request of Campbell, Mr. Wright entered the front seat of this vehicle flanked on either side by the defendants (TR. 122-123).

Campbell inquired whether the Federal Bureau of Investigation had appeared at Auto Salvage. Following Wright's denial, Meyer stated they had nothing "to worry about . . . anyway" (TR. 125). The parties then proceeded to the North Dakota Inn where Campbell asked whether Wright had "wrecked" the 1965 Mustang and if he would take a "torch" to the serial number on this vehicle (TR. 126). Campbell further informed Wright that if he ever wanted to leave the wrecking business and make "big money" to let him (Campbell) know (TR. 126).

In testifying in their own behalf, each of the defendants admitted the transportation of the three (3) vehicles described in the indictment from the State of Washington to Portland, Oregon, but denied any knowledge of their stolen character (TR. 277-301, 340-370).

On February 6, 1967, a complaint was filed before United States Commissioner Louis Stern in Portland, Oregon, charging the defendant Meyer with receiving, concealing and selling the 1964 Ford stolen from Dewey Griffins Used Car Lot in Lynnwood, Washington, in violation of Title 18, Section 2313, United States Code (Govt. App. 1-2). A warrant was issued, and on February 13, 1967, Meyer was arrested in Woodland, Washington while driving his 1963 Cadillac by officers of the Washington State Patrol (TR. 173-174).

At the scene of the arrest, Sgt. Frank Perry examined the car including the front and rear seats, trunk and glove compartments. The car was then driven to Don's Texaco Service Station in Woodland, Washington, where it was impounded and the contents inventoried (TR. 174-175, 205-207). It was then stored at the residence of Mr. Don Stevenson, owner of the station and an agent bonded by the State of Washington for the purpose of storing impounded vehicles (TR. 205-207).

Both Sgt. Perry and Mr. Stevenson testified nothing was removed from the vehicle (TR. 175, 206-207).

On February 14, 1967, William Church, United States Commissioner for the Western District of

Washington, issued a search warrant for defendant's vehicle (Govt. App. 5-8). The warrant was executed the same day and the vehicle searched by Agents Taylor and Netter of the Federal Bureau of Investigation. A pop-rivet gun, its container, and certain metal die stamps were removed from the trunk (TR. 207-209, 219-220, 245-248, 262-263; Govt. Ex. 38, 38-A, 39, 39-A).

The pop-rivet gun was subsequently identified as the same as or similar to the tool which installed the warranty plates on the 1964 Ford stolen from Dewey Griffins Used Car Lot and the 1965 Mustang stolen from Austin Fraser Motors (TR. 266-269; Govt. Ex. 5, 36, 38, 38-A).

The die stamps removed from the trunk of defendant's car were stricken from the record on the theory the Government violated the best evidence rule by failing to produce the container in which they were transmitted to and from Washington, D.C. (TR. 273-276, 410-411; Govt. Ex. 39, 39-A).

SUMMARY OF ARGUMENT

I.

The ruling of Trial Court permitting F.B.I. Agent Max Taylor to remain at Government counsel table during the trial and to eventually testify was not error being within the sound discretion of the Court which will not be reviewed absent a case of clear abuse.

II.

The comments of the Trial Court, selected out of context, with respect to a certain record offered under the Business Records Act were not error and in no way militated against defendant's right to a fair trial. Moreover the failure of either trial counsel to assert this point in Court below constituted a waiver thereby precluding its review.

III.

Defendant's contention that records admitted under the Business Records Act lacked the requisite foundation is totally without merit. This point was again waived by the failure of either trial counsel to object to any Government exhibit save two (2), neither of which were business records, and both of which were eventually stricken from the record.

IV.

The showing of photographs by police officers and F.B.I. Agents to a prospective Government witness in an attempt to determine the identity of the defendants was neither prejudicial nor improperly suggestive. This point must also be considered to have waived since neither trial counsel interposed any objection or sought any other remedial action.

V.

The statements of the defendant Campbell made to a third person during the course of the illegal venture were properly admitted against the defendant Meyer.

VI.

There was no impropriety in the arrest of the defendant Meyer or in the subsequent search of his vehicle. These events were predicated upon the filing of a complaint and the issuance of a search warrant which are clearly sufficient under applicable legal principles and which were never questioned by either trial counsel.

VII.

The Trial Court's refusal to give defendant's requested instruction on the issue of guilty knowledge was not error, a similar and more favorable instruction on the same issue having been given.

ARGUMENT

I.

The Ruling of the Trial Court Permitting FBI Agent Max Taylor to Remain at Government Counsel Table Throughout the Trial was not Error Being within the Sound Discretion of the Court.

Defendant contends error was committed in permitting FBI Agent Taylor to remain at Government counsel table during the course of trial (D. Br. 3-4). It is well settled that authorizing a Government agent to remain in the courtroom to assist and advise Government counsel during trial rests within the sound discretion of trial court which will not be reviewed absent a case of clear abuse. This rule obtains even though the agent testifies, as did Agent Taylor in the case at bar, after observing the demeanor and hearing the testimony of preceeding witnesses. *Powell v. U.S.,* 208 F.2d 618, 619 (6th Cir., 1953), *cert. den.* 347 U.S. 961; *Schoppel v. U.S.* 270 F.2d 413, 416-417 (4th Cir., 1959); *Portomene v. U.S.,* 221 F.2d 582 (5th Cir., 1955); *Laird v. U.S.,* 252 F2d 121 (4th Cir., 1958); *Johnston v. U.S.,* 260 F.2d 345, 347 (10th Cir., 1958), *cert. den.* 360 U.S. 935. See also *Dancy v. U.S.,* 390 F.2d 370, 371 N. 1 (5th Cir., 1968). It is clear therefore defendant's unspecified assignment of prejudice eminating from the Court's ruling is wholly without merit particularly since all other Government witnesses were excluded prior to the *voir dire* (TR. 11-12).

II.

The Trial Court's Comments With Respect To The Admissibility Of Documents Offered Under The Business Records Act In No Way Deprived Defendant Of A Fair Trial.

Defendant has selected out of context and alleged as prejudicial error a single statement by the trial court concerning the admission of a certain document offered under the Business Records Act (Title 28, Section 1732, United States Code) (D. Br. 4; TR. 17). Although the assignment might be summarily disposed of as *de minimus* in nature and clearly devoid of error, in view of the charge some comment seems appropriate.

When read in its proper context, it is patently apparent the statement complained of is but an expression of concern on the part of the trial court over an issue which supposedly had been litigated prior to trial (TR. 16-18). In what manner the statement or the "obviously prejudicial" remarks which allegedly followed but which are neither set forth in defendant's brief nor found in the record were improper is left completely to the imagination (D. Br. 4, TR. 17). That neither trial counsel considered his client's rights to have been impaired is manifest by their failure to take exception to the statement, move for a mistrial or request any cautionary

or protective instructions. The cases are legion that issues, even if constitutional, not properly raised and preserved in the trial court for review, will not be noticed on appeal. See for example *U.S. v. Millpax,* 313 F.2d 152, 156-157 (7th Cir., 1963), *cert. den.* 373 U.S. 903; *U.S. v. McCarthy,* 297 F.2d 183 184 (7th Cir., 1961), *cert. den.* 369 U.S. 850; *U.S. v. Greenberg,* 268 F.2d 120, 123-124 (2nd Cir.,1959); *Minor v. U.S.,* 375 F.2d 170, 172 (8th Cir., 1967), *cert. den.* 389 U.S., 882; *U.S.v.Miller,* 316 F.2d 81 (6th Cir., 1963), *cert. den.* 375 *U.S.* 935; and *Hansberry v. U.S.,* 295 F2d 800, 801 (9th Cir, 1961) The only exception to the foregoing proposition is where failure to consider the point on appeal would result in an obvious miscarriage of justice despite defendant's failure to raise the issue in the trial court (R. 52(b), Federal Rules of Criminal Procedure). Not only does the record in the instant case not warrant the invocation of the "plain error" doctrine, but defendant himself makes no such suggestion.

Defendant has also conveniently overlooked the trial court's caveat to the jury characterizing the discussion with counsel as simply a "misunderstanding" which they were to disregard (TR. 18, 23-24). Suffice to say the foregoing indicates not the slightest prejudice toward either the defendant or his trial counsel.

III.

No Error Was Committed In Admitting Records Proffered Under the Business Records Act.

Defendant contends "records" were admitted under the Business Records Act, Title 28, Section 1732, United States Code, without the requisite foundation (D. Br. 4). Exactly what "records" and in what particulars their foundation was deficient we are not told. The weakness inherent in defendant's contention is that once again he neatly overlooks the complete absence of any objection whatever by either trial counsel to any Government exhibits save the metal die stamps taken from the trunk of defendant Meyer's car following his arrest (Govt. Ex. 39, 39-A). These two (2) exhibits were eventually stricken from the record (TR. 411).

With respect to the question of waiver, see Government's Brief Point II and cases cited therein.

IV.

The Showing Of Photographs To Prospective Witnesses For Purposes Of Identification Was Neither Prejudical Nor Improperly Suggestive.

Without citation of authority it is contended the use of photographs shown to "various persons" in an attempt to identify the defendant was unneces-

sarily suggestive thereby requiring reversal (D. Br. 5). Aside from his reference to page 49 of the Trial Transcript which encompassed the cross examination of Mr. Edward Lincoln of Lincoln Auto Wreckers, Seattle, Washington, no names of, references to any other witnesses are made. The Government will therefore confine its remarks on this issue to Mr. Lincoln's testimony.

The fact that Mr. Lincoln was shown numerous photographs on several occasions is not indicative of any impropriety. A review of his testimony in its entirety clearly shows an attempt on the part of the Government to identify two (2) unknown subjects (TR. 29-60), a legitimate function of law enforcement officers. *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). See also: *U.S. v. Marson* .... F2d .... (4th Cir 1968). This procedure is readily distinguishable from a case where the prosecution repeatedly displays to a prospective witness(es) photographs of a known subject thereby enhancing the prospects for courtroom identification.

Moreover, the procedure used by the police and Federal Bureau of Investigation in the case at bar was obviously considered not to have been " . . . so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" since neither trial counsel interposed any

objection, made motions to strike, for mistrial, or sought any other curative action. *Simmons v. U.S.*, 390 U.S. 377, 384 (1968), and Government's Brief Point II above and cases cited therein.

V.

The Statements Of The Defendant Campbell To A Third Person During The Course Of The Conspiracy Were Properly Admitted Against The Defendant Meyer.

It is urged that failure to restrict the admissibility of various incriminating statements made by defendant Campbell to Government witness Marvin Wright solely to the declarant Campbell was error (D. Br. 5-6; TR. 118-121, 125-127).

Initially it must be noted that not only did some of the conversations related by Mr. Wright take place in the presence of the defendant Meyer, but once again there were no objections or requests for limiting or cautionary instructions by either trial counsel (TR. 121-123, 125-127).

Turning to the merits of defendant's contention, it is well settled that declarations of one defendant implicating another or showing the latter's guilty knowledge may properly be considered by the jury in passing upon the guilt of each of the parties charged once the trial court is satisfied there is suf-

ficient evidence, if believed by the jury, independent of the statement(s), to establish the conspiracy or illegal venture. Such evidence is not inadmissible hearsay, falling " . . . within the well recognized exception to the . . . rule that one co-conspirator's statements are admissible against another." *White v. U.S.*, 394 F.2d 49, 54 (9th Cir., 1968). In addition, the trial court's charge to the jury on the matter set forth below was, in all probability, more favorable to the defendants than the law requires. *White v. U.S.*, 394 F.2d 49, 52 (9th Cir., 1968).

> "When two or more persons knowingly associate themselves together to carry out a common plan, either lawful or unlawful, there arises from the very act of knowingly associating themselves together, for such a purpose, a kind of partnership, in which each member becomes the agent of the other.
>
> "So, where the evidence in the case shows a common plan or arrangement between two or more persons, evidence as to an act done or statement made by one is admissible against all, provided that the act be knowingly done and the statement be knowingly made during the continuance of the arrangement between them, and in furtherance of some object or purpose of the common plan or arrangement, if any.
>
> "In order to establish proof that a common plan or arrangement, if any, existed, the evidence must show that the parties to the plan

in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish some common object or purpose.

"In order to establish proof that a defendant was a party to or member of some common plan or arrangement, the evidence must show that the plan was knowingly formed, and that the defendant knowingly participated in the plan, with the intent to advance or further some object or purpose of the plan.

"In determining whether or not a defendant was a party to or a member of a common plan, you are not to consider what others may have said or done. That is to say, the membership of a defendant in a common plan must be established by evidence as to his own conduct — what he himself knowingly said or did.

"If and when it appears from the evidence in the case that a common plan did exist, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person likewise found to be a member, may be considered by you as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the other defendant, provided that such acts and statements were knowingly done and made during the continuance of the common plan, and in furtherance of some object or purpose of the plan.

> "I again repeat that otherwise, any admission or incriminatory statement made or any act done by one person, outside of court, may not be considered as evidence against any person who was not present and saw the act done or heard the statement made.
>
> "A statement or an act is 'knowingly' made or done if made or done voluntarily and intentionally, and not because of mistake or accident or other innocent reason." (TR. 420-422)

That defendants were not formally charged with conspiracy neither vitiates nor alters test for the admissibility of the declaration of one against another. *Hitchman Coal & Coke Co. v. Mitchell,* 245 U.S. 229, 249 (1917); *Fuentes v. U.S.,* 283 F.2d 537, 539 (9th Cir., 1960); *U.S. v. Olweiss,* 138 F.2d 798, 800 (2nd Cir., 1943), *cert den* 321 U.S., 744; *U.S. v. Smith,* 343 F.2d 847, 849 (6th Cir., 1965), *cert den.* 382 U.S. 824; *U.S. v. Jones,* 374 F.2d 414, 418 (2nd Cir., 1967), *cert den.* 389 U.S. 835.

VI.

There Was No Impropriety In Defendant's Arrest Or The Subsequent Search Of His Car.

In vague and nebulous terms defendant complains about the propriety of his arrest and the subsequent search of his car (D. Br. 6-7). However, at no time from the inception of the prosecution until the filing

of the notice of appeal did defendant see fit to urge, directly or indirectly, either of these points.

Turning to the merits of defendant's assignment notwithstanding its waiver the record reflects a complaint was filed in Portland, Oregon, on February 6, 1967 charging defendant Meyer with a violation of Title 18, Section 2313, United States Code (Govt. App. 2-3). A warrant was issued and seven (7) days later Meyer was arrested by officers of the Washington State Patrol (D. Br. 6; TR. 173-174).

The arrest is challenged in part upon the theory that at the time it was effected, defendant was personally unaware of the existence of any warrant (D. Br. 6). Unfortunately defendant offered no testimony on this question thereby precluding review of his unrecorded thoughts. It is well established on appeal that the evidence will be viewed not through the eyes of the defendant, but in the light most favorable to the Government. *Glasser v. U.S.*, 315 U.S. 60, 80 (1942); *White v. U.S.*, 394 F.2d 49, 51 (9th Cir., 1968).

In any event, the validity of the arrest is bottomed, not upon the defendant's state of mind, but upon the sufficiency of the complaint itself. *Giordenello v. U.S.*, 357 U.S. 480 (1958). In the case at bar the precepts set forth by the Supreme Court in

Giordenello are clearly satisfied by the complaint of February 6, 1967 (Govt. App. 2-3).

After the arrest, the car was searched, its contents examined, and later inventoried (TR. 173-175, 205-207). None of the contents, however, were removed until February 14, 1967, when a search warrant issued by the United States Commissioner for the Western District of Washington (Govt. App. 5-9) was executed by Agents of the Federal Bureau of Investigation. Pursuant to its authority, a pop-rivet gun, its container and certain metal die stamps were removed from the trunk of the car (TR. 207-209, 219-220, 245-248, 262-263; Govt. Ex. 38, 38-A, 39, 39-A).

Defendant's concern over the fact the search preceded the indictment's return by some two (2) months is without foundation (D. Br. 6; Govt. App. 10-11). The validity of the initial arrest on February 13, 1967 and the propriety of the search the following day rest entirely upon the sufficiency of the complaint, the search warrant, and the accompanying affidavit (Govt. App. 2-9). *Giordenello v. U.S.*, 357 U.S. 480 (1958); *Aguilar v. Texas*, 378 U.S. 108 (1964); *U.S. v. Ventresca*, 380 U.S. 102 (1965); Rule 41, Federal Rules of Criminal Procedure.

Even a cursory perusal of these documents demonstrates defendant's assignment is without basis in law or fact.

VII.

Trial Court's Refusal To Give Defendant's Requested Instruction On The Issue Of Guilty Knowledge Was Not Error, A Similar And More Favorable Instruction On The Same Issue Having Been Given.

It is suggested the trial court's refusal to give defendant's requested instruction on the issue of guilty knowledge was error (D. Br. 8). Defendant carefully ignores the inclusion in the court's charge of a more favorable instruction on this precise issue (TR. 419-420). This instruction and those immediately preceding it on the same and related issues provide:

> "Now, the essential elements required to be proved in order to establish the offense as charged in each count of the indictment are:
>
> "First, the act of receiving, concealing and selling a stolen motor vehicle which moved in interstate commerce, as charged;
>
> "Second, doing such act wilfully and with the knowledge that the motor vehicle described in each count of the indictment had been stolen and had moved in interstate commerce.

"The offense is complete when these elements just read are established by the evidence in the case. The Government need not show who may have stolen the motor vehicle.

"As previously mentioned, the burden of proof is always on the Government to prove beyond a reasonable doubt each essential element of the crime as to each count.

"As I have previously mentioned, one essential element of the offense as charged in each count is knowledge of the accused that the automobile was, in fact, a stolen automobile at the time the alleged offense was committed. If you should find that one of the defendants, in good faith, believed that the other defendant owned the automobile in question, or owned some interest therein, or that the other defendant had the right to possession of the motor vehicle at the time and place of the alleged events, then the defendant so believing cannot be found to have wilfully received, concealed and sold a stolen motor vehicle moving in interstate commerce, and it would be your duty to return a verdict of not guilty in his favor." (TR. 419-420)

The proposition that the trial court is not obliged to follow verbatim defendant's requested instructions so long as the charge adequately covers the law including defendant's theory is so well accepted no citation of authority is necessary.

Defendant also assigns as error the giving of an-

other but completely unspecified instruction (D. Br. 8-9). Interestingly enough, although defendant claims he excepted to this instruction (D. Br. 8), the record clearly manifests his sole exception was to the court's failure to give the instruction set forth on page 8 of his brief and discussed above (D. Br. 8; TR. 429-431). The only other exception to any portion of the charge was by counsel for defendant Campbell. Defendant Meyer cannot cure his failure to render timely objection by relying upon the objection interposed by his co-defendant; an objection in which he saw fit not to join (TR. 430-431). Rule 30, Federal Rules of Criminal Procedure.

It must be noted at this juncture that with the exception of his initial assignment, discussed in Point I of the Government's Brief, defendant's abject failure to specify the errors alleged and clearly articulate his contentions with respect to them in contravention of the rules for preparation of briefs on appeal[8] has rendered it particularly onerous for the Government to determine what issues are being raised and how to answer same. Although it has long been acknowledged that issues not properly presented for review will not be noticed, *U.S. v. Cushman,*

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[8] Rule 28, Federal Rules of Appellate Procedure; Rule 5, Rules of United States Court of Appeals for the Ninth Circuit; Rule 40, Revised Rules for the Supreme Court of the United States. See also former Rules 18 and 19 of Court of Appeals for the Ninth Circuit.

136 F.2d 815, 817 (9th Cir., 1943), *Neely v. Eby Const. Co.,* 386 U.S. 317, 330 (1967), rehearing *den.* 386 U.S. 1027, defendant is fain to rely upon the sagacity, clairvoyance, tenacity of the Government and presumably the Court to determine precisely what issues he wishes to litigate. Notwithstanding his failing in this respect, it is evdent from both the record and the briefs not only was no error committed in the Court below, but defendant received the benefit of an eminently fair trial.

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction of the defendant Ronald Lee Meyer be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CHARLES H. TURNER
Assistant United States Attorney

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

v.

RONALD L. MEYER,
Defendant.

CR 67-117
Commissioner's Docket No.
CM 7-44
COMPLAINT for VIOLATION of U.S.C. Title 18 Section 2313

BEFORE LOUIS STERN, Portland Oregon,

The undersigned complainant being duly sworn states: That on or about January 23, 1967, at Portland in the District of Oregon RONALD L. MEYER, defendant did wilfully, knowingly, unlawfully and feloniously receive, conceal and sell a stolen motor vehicle, that is a 1964 Ford 2-door Sedan, Serial No. 4G68C123837, which was moving as interstate commerce from Lynnwood, Washington, to Portland within the District of Oregon, the said defendant then and there well knew the said motor vehicle to have been stolen; in violation of Section 2313, Title 18, United States Code.

And the complainant states that this complaint is based on the following: On or about 1-20-67, at Portland, Oregon, Meyer was present and participated in the purchase of a totally wrecked 1964 Ford 2-door hardtop sedan, Serial No. 4G66X158141, Oregon License BAL-450. Title to this vehicle was surrendered by the seller, and the vehicle was left on the premises of the seller. The license plates and

warranty plate bearing the Serial No. 4G66X158141 was removed from the vehicle on or about 1-23-67 at Portland, Oregon. Meyer sold a 1964 Ford 2-door hardtop bearing Oregon License BAL-450, and warranty plate bearing Serial No. 4G66X158141, and surrendered Oregon title bearing this license number and serial number. An examination of this vehicle at Portland, Oregon, on 1-30-67, reflected the true Serial No. to be 4G68C123837. It was determined that a 1964 Ford 2-door hardtop, Serial No. 4G68C123837, and Washington License JJT-464 had been reported as stolen from Lynnwood, Washington on or about 1-23-67. On 2-3-67, Meyer participated in the removal, from the premises of the seller at Portland, Oregon, the totally wrecked 1964 Ford 2-door hardtop sedan, Serial No. 4G66X158141.

/s/ Max E. Taylor

MAX E. TAYLOR

Special Agent - F.B.I.

Sworn to before me, and subscribed in my presence, February 6, 1967.

/s/ Louis Stern

LOUIS STERN

United States Commissioner

A TRUE COPY
Donal D. Sullivan, *Clerk*

(Seal)

By /s/ E. Nowell
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT COURT
SOUTHERN DIVISION

Commissioner's Docket No. 1

UNITED STATES OF AMERICA, **Case No. 101**

v. **SEARCH WARRANT**

RONALD LEE MEYER

TO

Affidavit having been made before me by John Carl Netter that he has reason to believe that on the premises known as 1963 Cadillac 2-Door with Oregon License 5R7373 located at Woodland, Washington in the Western District of Washington there is now being concealed certain property, namely warranty plates, master ignition keys, metal stamping dies, a riveting gun, set of Washington automobile dealers plates and miscellaneous tools which are believed to have been used as instrumental in connection with the false documentation of stolen motor vehicles and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith

the person/place named for the property specified, serving this warrant and making the search at any time in the day or night and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 14 day of February, 1967.

/s/ William Church

U.S. Commissioner

A TRUE COPY

Donal D. Sullivan, Clerk

(Seal)

By /s/ M. Hartzell

Deputy Clerk

AFFIDAVIT FOR SEARCH WARRANT

UNITED STATES OF AMERICA)

WESTERN DISTRICT OF WASHINGTON)

SOUTHERN DIVISION)

JOHN CARL NETTER, being first duly sworn, under oath, deposes and says: That he is a Special Agent for the Federal Bureau of Investigation stationed at Vancouver, Washington, and that in the course of his official duties he has participated in an investigation of a series of activities including the theft and interstate transportation of stolen motor vehicles pursuant to a federal warrant issued by a U.S. Commissioner, Portland, Oregon on February 6, 1967, charging Ronald L. Meyer with violation of Title 18, Section 2313, U.S. Code. Meyer was arrested near Woodland, Washington on February 13, 1967 by officers of the Washington State Patrol. At the time of the arrest and incidental to the arrest the vehicle operated by Meyer, a 1963 Cadillac Two-Door, Oregon License 5R7373 was searched by officers of the Washington State Patrol and they observed the following items: In the glove compartment were ten (10) to twelve (12) keys which appeared to be master automobile ignition keys and two warranty

plates for Ford cars. Also observed in the trunk of this Cadillac, a set of Washington automobile dealers plates, a set of metal stamping dies, and a hand riveting gun and other miscellaneous tools. Ronald L. Meyer has been identified as selling a stolen 1964 Ford Two-Door sedan which was traveling in interstate commerce, on which a warranty plate had been attached by means of a rivet other than that used by the manufacturer. In addition, he has been identified as selling a stolen 1965 Mustang that was traveling in interstate commerce and on which the serial number had been obliterated and another number stamped with dies similar to those observed by officers of the Washington State Patrol. In addition the warranty plates observed did not belong to the 1963 Cadillac in which Meyer was arrested. In addition, the large number of ignition keys are believed to be the type which will unlock the ignition of most Ford automobiles.

That your affiant requests a search warrant for said 1963 Cadillac, particularly searching for warranty plates, master ignition keys, metal stamping dies, a riveting gun, a set of Washington automobile dealers plates and miscellaneous tools which were

in fact used in furtherance of false documentation of stolen vehicles.

/s/ John Carl Netter

Subscribed and sworn to before me this 14 day of February, 1967.

/s/ William Church

United States Commissioner
Western District of Washington

A TRUE COPY
Donal D. Sullivan, *Clerk*

(Seal)

By /s/ M. Hartzell
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

vs.

RONALD LEE MEYER and
DONALD EDWARD CAMPBELL,

Defendants.

NO. CR 67-117
INDICTMENT
[18 U.S.C. § 2313]

THE GRAND JURY CHARGES:

COUNT I. That on or about January 23, 1967, at Portland, within the District of Oregon, RONALD LEE MEYER and DONALD EDWARD CAMPBELL, defendants, did wilfully, knowingly, unlawfully and feloniously receive, conceal and sell a stolen motor vehicle, that is a 1964 Ford 2-door Sedan, Serial No. 4G68C123837, which was moving as interstate commerce from Lynnwood, Washington, to Portland, within the District of Oregon. Defendants then and there well knew said motor vehicle to have been stolen; in violation of Section 2313, Title 18, United States Code.

COUNT II. That on or about January 19, 1967, at Portland, within the District of Oregon, RONALD LEE MEYER and DONALD EDWARD CAMPBELL, defendants, did wilfully, knowingly, unlawfully and feloniously receive, conceal and sell a stolen motor vehicle, that is a 1965 Mustang 2-door Hardtop, Serial No. 5F07D152305, which was mov-

ing as interstate commerce from Seattle, Washington, to Portland, within the District of Oregon. Defendants then and there well knew said motor vehicle to have been stolen; in violation of Section 2313, Title 18, United States Code.

COUNT III. That on or about January 23, 1967, at Portland, within the District of Oregon, RONALD LEE MEYER and DONALD EDWARD CAMPBELL, defendants, did wilfully, knowingly, unlawfully and feloniously receive, conceal and sell a stolen motor vehicle, that is a 1965 Mustang 2-door Hardtop, Serial No. 5F07D159898, which was moving as interstate commerce from Seattle, Washington, to Portland, within the District of Oregon. Defendants then and there well knew said motor vehicle to have been stolen; in violation of Section 2313, Title 18, United States Code.

Dated this 7th day of April, 1967.

A TRUE BILL.

/s/ L. F. Aichlmayr

Foreman

SIDNEY I. LEZAK
United States Attorney
District of Oregon

/s/ Charles H. Habernigg

CHARLES H. HABERNIGG
Assistant United States Attorney